

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
 Improving Public Safety Communications in )  
 The 800 MHz Band )  
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 Consolidating the 900 MHz Industrial/Land )  
 Transportation and Business Pool Channels )

WT Docket No. 02-55

To: The Commission

**COMMENTS ON PROPOSED 800 MHZ CONSENSUS PLAN**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (Blooston), on behalf of its clients listed in Attachment A hereto who utilize spectrum in the 800 MHz band for commercial and private internal uses, hereby submits, pursuant to the Federal Communications Commission's Public Notice entitled: "Wireless Telecommunications Bureau Seeks Comment on 'Consensus Plan' Filed in the 800 MHz Public Safety Interference Proceeding," September 6, 2002 (DA-02-2202), the foregoing comments in the above-captioned proceeding. As demonstrated in our comments and reply comments in this docket, the consensus plan proposed by Nextel Communications, Inc. (Nextel) and others (the Plan) is not the correct alternative and does **NOT** truly represent a consensus of the entire industry.

Rather, Blooston urges the Commission to require the use of well-established technical solutions for resolving interference on a case-by-case basis. This method is less disruptive to 800 MHz licensees and is far less expensive than "rebanding" the 800 MHz

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band or relocating incumbent licensees to other frequency bands. This is because the 800 MHz band is heavily congested with public safety, Business/Industrial Land Transportation (B/ILT) users (such as public utilities, waste haulers, transportation providers, and automobile emergency road service providers), analog SMR, cellularized SMR, and cellular licensees. And, like public safety licensees, many B/ILT licensees provide critical infrastructure services (e.g., automobile emergency road services, electrical power, water and sewer services, waste hauling, etc.) to the public, which services could be substantially disrupted by a frequency relocation within or outside the 800 MHz band.

**I. The 800 MHz Consensus Plan Does Not Adequately Protect All Incumbent 800 MHz Licensees' Needs.**

**A. Nextel's Funding Mechanism is Insufficient.**

Blooston has reviewed the Plan put forth by Nextel and others as part of a self-dubbed "consensus." While the Plan lays a framework for resolving the 800 MHz interference problem to public safety systems, Blooston is concerned that the Plan, as currently formulated, does not adequately protect or represent all affected parties. First and foremost, the Plan does not demonstrate that Nextel will be able to complete the swap of all of its spectrum and that of Nextel Partners. This is because Nextel only holds a minority interest in its affiliate, Nextel Partners, and there is no certainty that Nextel will be able to obtain Nextel Partners' concurrence to any spectrum swap that is being proposed as part of the industry compromise. The lack of such concurrence could result in a collapse of the Plan if Nextel is unable to surrender sufficient spectrum.

Second, the mechanism for funding the frequency swap is flawed on multiple fronts – with respect to both public safety users and incumbent B/ILT and analog 800 MHz SMR users. The Plan states that in addition to the surrender of spectrum in the 700, 800 and 900 MHz bands, Nextel will pledge and guarantee a payment of \$500 million to cover the relocation of public safety systems, but that if such funds are exhausted and no other funding is secured, Nextel, in its “complete discretion,” may determine whether to provide any additional funding. Plan at 20. While Nextel has offered to guarantee a \$500 million payment, the Plan correctly contemplates that the \$500 million will be insufficient to complete the frequency relocation in all of the Public Safety Regions. As a result, Nextel will have caused a major disruption to the entire 800 MHz band under the banner of protecting public safety without actually ensuring the financial means to accomplish this rebanding, since any further contributions to cover relocation costs above an aggregate of \$500 million would be in Nextel’s sole discretion.<sup>1</sup>

With respect to B/ILT and analog SMR users, the Plan, in one sentence, correctly observes that “B/ILT and traditional SMR, should not bear the burden of relocation costs caused by the introduction of incompatible system architectures in the 800 MHz band.” Plan at 19. Blooston concurs with this conclusion, but is nonetheless concerned that this will amount to an empty promise. No funding plan was developed prior to the

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<sup>1</sup> The argument put forth in the Plan that this known funding shortfall will provide an incentive for Nextel and the public safety community to seek alternative funding sources for a problem that the record well demonstrates is of Nextel’s own making is nothing short of incredible. Once Nextel has swapped its 700 MHz, 800 MHz and 900 MHz spectrum for the coveted 2.1 GHz MSS nationwide license and made its \$500 million

submission of the Plan to the Commission, or put forth as a supplement to the plan in the month prior to the Commission's request for public comment on the Plan. Rather, the Plan contains the following footnote with respect to this issue: "While the parties have no formal plan at this time, Nextel and the private wireless community are currently discussing funding issues with respect to private wireless relocation." Plan at 19, fn. 56. Until there is a firm commitment to ensure that the relocation/retuning costs for incumbent B/ILT and analog SMR users are reimbursed, these entities are not protected, and there can be no consensus.

The record in this proceeding is clear that the \$500 million pledged by Nextel is wholly inadequate to fund public safety relocation, much less the relocation of numerous B/ILT and analog SMR systems. See Comments of Boeing Company at 6-7 (Cost to relocate to another frequency band would be over \$50 million alone, while retuning would cost several million dollars); Comments of Fairfax County at 5 (Fairfax County estimates that the \$500 million pledge from Nextel would only cover five to ten percent of the total expected cost that would be incurred by all public safety entities nationwide, which does not include the cost incurred by incumbent B/ILT and analog SMR users); Consumers Energy Company at 20 (Estimated equipment costs for frequency relocation are \$40 million, including cost for construction of additional tower sites, if required to relocate to 900 MHz band). Blooston is further concerned that any reliance on Congress or the Administration to make up any shortfalls may fall on deaf ears. This is because

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contribution, it will have no further incentive to do anything more, since the terms of the Plan, it could now wash its hands of the matter.

funding may not be available (even if Congress and the Administration agree that funding for this purpose is important) if tax revenues continue to fall short as governmental expenditures in prosecuting the war on terrorism increase significantly. As a result, Blooston fears that the small B/ILT licensees and even the cellular licensees, neither of whom are the root cause of the interference problem, will be forced to pay for their own relocation costs and/or contribute a substantial amount of money to relocate public safety licensees, as envisioned by Nextel's original plan. See Nextel White Paper at 39 and 41; NPRM at 15. Without guaranteed funding to protect all licensees, Blooston believes that there can be no true industry consensus on this issue. Rather, there exists only "ongoing discussions" on this issue (without any secured commitments represented) and the risk that (a) incumbent B/ILT and analog SMR users could, in the end, be left holding the bag for their relocation expenses and/or (b) that cellular licensees could be forced to contribute substantial sums of money to fix a problem that they did not create. Either way, the result is grossly inequitable.

**B. The Plan's 900 MHz Incentive for B/ILT and Analog SMR Users May Not be Practicable.**

In order to induce B/ILT and analog SMR users to relocate their systems from the 806-816/851-861 MHz band to the 900 MHz band, the Parties to the Plan have suggested that the Commission award 50 kHz of 900 MHz spectrum for each 25 kHz 800 MHz channel that is voluntarily vacated. Plan at 18.<sup>2</sup> While, at first blush, it would appear that

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<sup>2</sup> The 900 MHz Incentive would be available only during the NPSPAC retuning process in a particular Public Safety Region. Once the NPSPAC retuning process is completed,

the two-for-one frequency swap could be a good incentive for incumbent 800 MHz B/ILT and analog SMR licensees, this proposal may not be so good after all. The reasons center on equipment issues and cost.

In the 900 MHz band, reliable customer equipment for 900 MHz systems appears to be non-existent. While equipment exists for such services, the equipment has proven to be unreliable, to the point that the industry has indicated that some carriers are no longer marketing the service. Because of the subscriber equipment issue alone, analog SMR licensees may be unable to migrate their systems from the 800 MHz band to the 900 MHz band due to the risk of alienating their subscriber base.

The record in this proceeding more than adequately demonstrates the additional costs that would be incurred if a system were to be relocated from the 800 MHz band to the 900 MHz band. The propagation characteristics of the 900 MHz band require additional transmitter sites, and the existing 800 MHz equipment would have to be replaced since it cannot be retuned to the 900 MHz band. See Comments of American Public Transportation Association at 2; Comments of Carolina Power and Light and TXU Business Services at 5; Comments of Bosshard Radio Service at 4. Since there is no guarantee that relocation costs will be reimbursed for B/ILT and analog SMRS licensees, this proposal is a non-starter. For critical infrastructure services, such as public utilities, waste haulers, automobile emergency service providers, etc., the issue is not necessarily cost alone, which could be in the tens of millions of dollars per system. Rather, the issue

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incumbent B/ILT users would no longer be able to gain the additional spectrum. Plan at 18, fn. 53.

is also one of safety and the risks involved in making a transition to a new frequency band from a system that has proven to be cost efficient and reliable.<sup>3</sup> As a result, the 900 MHz incentive offer is not a remedy for B/ILT and analog SMR licensees.

**C. Nextel's Proposed Frequency Exchange for 2.1 GHz MSS Spectrum Could Create Uncertainty in Resolving Interference to Public Safety.**

The lynchpin to the Plan for resolving public safety interference is the conclusion that "Nextel must be made whole through an alternative spectrum allocation of 10 MHz at 1910-1915/1990-1995 MHz," a contiguous nationwide license in the 2.1 GHz MSS Band. Plan at 18-19. Throughout this proceeding, several parties have questioned (and continue to question) the fairness and competitive impact of giving Nextel a nationwide license that would no doubt sell for billions of dollars at auction, in exchange for a \$500 million pledge and what is largely encumbered and non-contiguous spectrum. See Joint Comments of Cingular Wireless, LLC and ALLTEL Communications, Inc. at 11-13; Comments of Supreme Radio Communications, Inc. at 12-13; Comments of United States Cellular Corporation at 4-5; Comments of Verizon Wireless at 13-15; Comments of Southern Linc at 50-52; Comments of AT&T Wireless Services, Inc. at 20-21. The threshold question beyond fairness is whether it would be legal, under Section 309(j) of the Communications Act of 1934, as amended (the Act), for the Commission to award Nextel the requested 10 MHz license in the 2.1 GHz MSS Band through means other than competitive bidding. This is because Section 309(j) of the Act requires the Commission

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<sup>3</sup> In this regard, the record clearly reflects that certain public utilities made the concerted decision not to utilize the 900 MHz band in favor of the 800 MHz band when designing their systems.

to grant initial licenses which are the subject of mutually exclusive applications through competitive bidding. Joint Comments of Cingular Wireless LLC and ALLTEL Communications, Inc. at 11-12; Comments of Verizon Wireless at 13-15; Comments of United States Cellular Corporation at 5; Comments of Southern Linc at 54-56; Reply Comments of ALLTEL Communications, Inc. et. al. at 10 – 11.

While the Plan states that the grant of a 2.1 GHz license would be the result of a swap for spectrum surrendered as part of a realignment plan, Cingular Wireless, LLC, Alltel Communications, Inc., Verizon Wireless and others have asserted that Nextel should be required to bid on this valuable spectrum since there is no doubt that there would be multiple applicants. Joint Comments of Cingular Wireless and ALLTEL Communications, Inc. at 12; Comments of Verizon Wireless at 15. See also, Reply Comments of ALLTEL Communications et. al. at 10 - 11. Because of the concerns raised by Verizon Wireless, Cingular Wireless, LLC, ALLTEL Communications, Inc. and other cellular and two-way CMRS carriers, the grant of the 10 MHz nationwide 2.1 GHz MSS Band license to Nextel, without a competitive bidding process, could result in protracted litigation before the Court of Appeals, and potentially, the United States Supreme Court. This litigation would create uncertainty in the 800 MHz band and would substantially delay any permanent interference solution that the Commission adopts since the solution would no doubt have been tied to a surrender of certain spectrum by Nextel for use in relocating incumbent licensees within the 800 MHz band. As a result, it could be several years, if not longer, before the Commission is able to resolve, with any



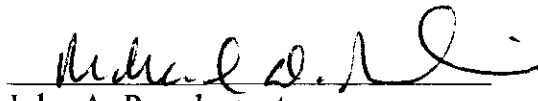
certainty, the interference issues that currently plague the public safety licensees within the 800 MHz band.

## **II. Conclusion.**

For the foregoing reasons, the Commission should ensure that any consensus plan that is adopted protects public safety communications in the 800 MHz band as well as incumbent critical infrastructure communications. Likewise, the Commission should ensure that only those parties responsible for causing interference to public safety communications are responsible, financially and otherwise, for its mitigation. In this regard, the Commission should mandate the use of technical solutions and should not seek contributions from cellular carriers or require incumbent analog SMR or B/ILT licensees to fund their own frequency relocations and/or retunings.

Respectfully submitted,  
**BLOOSTON, MORDKOFKY, DICKENS,  
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## **Attachment A**

Electronic Specialties, Inc.

Computer Car, Inc.

US Unwired, Inc.

Copper Valley Wireless, Inc.

Radio Communications Systems, Inc. d/b/a RCS Communications

3M Company

CC Communications

Southern Illinois RSA Partnership

## **CERTIFICATE OF SERVICE**

I, Kathleen A. Kaercher, an employee of the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, do hereby certify that on Monday, September 23, 2002, the foregoing Comments on Proposed 800 MHz Consensus Plan were mailed to the following via First Class, United States Mail, postage prepaid, unless otherwise noted:

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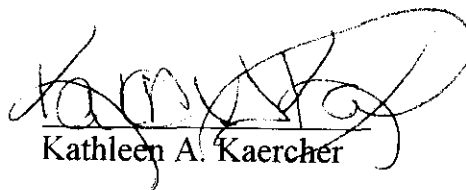
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Dated: September 23, 2002